

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYNE JEROME ROBERTSON,

No. C 03-3496 MEJ

Plaintiff,

**ORDER DENYING DEFENDANT
JOSEPH McGRATH'S MOTION TO
DISMISS; VACATING HEARING**

vs.

ROLF CUSACK, JOSEPH McGRATH, and
DOES 1-20,

**ORDER SCHEDULING CASE
MANAGEMENT CONFERENCE**

Defendants.

I. INTRODUCTION

Plaintiff Wayne Jerome Robertson, an inmate at Pelican Bay State Prison, brings claims for violation of his civil rights under 42 U.S.C. § 1983, negligence, and negligence per se pertaining to an alleged attack by two fellow inmates on January 12, 2003. Before the Court is defendant Joseph McGrath's Motion to Dismiss, filed July 14, 2006. (Doc. #63.) Upon review of the parties' arguments and relevant legal authority, the Court deems the matter appropriate for decision on the papers, VACATES the August 24, 2006 hearing, and DENIES McGrath's motion for the reasons set forth below.

II. BACKGROUND

A. Factual Background

The following factual background is taken from Robertson's First Amended Complaint (Doc. #58). Robertson is an inmate at Pelican Bay State Prison. On January 12, 2003, Robertson was housed in cell 221 of the A-6 housing unit in general population. Defendant Rolf Cusack, a

1 correctional officer at the prison, was assigned to the control booth of that housing unit. On that
2 day, Cusack failed to secure the housing unit prior to releasing Robertson from his assigned cell and,
3 as a result, two inmates attacked him with a homemade weapon, causing Robertson physical injury.

4 In his amended complaint, Robertson alleges that conflicting instructions regarding the
5 policies and procedures to be followed when releasing inmates from their cells were issued to
6 Cusack and other correctional officers at the prison, and that defendant Joseph McGrath, then
7 Warden of the prison, knew about the conflicting instructions, knew that prison staff were confused
8 by the conflict, and knew that prison staff were not taking adequate steps to ensure inmate safety.

9 **B. Procedural Background**

10 On July 28, 2003, Robertson filed a *pro se* complaint under 42 U.S.C. § 1983 for the injuries
11 he claims to have sustained during the January 12 incident. On December 7, 2005, the Honorable
12 Sandra Brown Armstrong appointed counsel for Robertson (Doc. #45). On January 24, 2006, the
13 parties voluntarily consented to magistrate jurisdiction and the case was reassigned to Magistrate
14 Judge Maria-Elena James. (Doc. #48.)

15 On February 2, 2006, Plaintiff filed a Motion for Leave to File First Amended Complaint
16 (Doc. #50), which the Court granted on April 4, 2006. (Doc. #55.) Robertson filed his First
17 Amended Complaint on April 10, adding Joseph McGrath as a defendant and adding causes of
18 action for negligence and negligence per se. Cusack filed an Answer to the amended complaint on
19 April 25. (Doc. #59.)

20 On July 14, 2006, McGrath filed a Motion to Dismiss (Doc. #63), as well as the Declaration
21 of D. Bradbury in support thereof. (Doc. #65.) McGrath also filed a Request for Judicial Notice.
22 (Doc. #64.)

23 On August 3, 2006, Robertson filed an Opposition to McGrath's motion (Doc. #70), as well
24 as the Declaration of Esther L. Klisura in support thereof. (Doc. #71.) Robertson also filed an
25 Objection to McGrath's Request for Judicial Notice. (Doc. #72.)

26 On August 9, 2006, McGrath filed replies to Robertson's oppositions. (Docs. ## 73, 74.)

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III. DISCUSSION

In his motion, McGrath moves this Court to dismiss Robertson's action against him on three grounds: (1) failure to exhaust administrative remedies, (2) the claims are barred by the applicable statute of limitations, and (3) failure to comply with the California Tort Claims Act.

A. Request for Judicial Notice

In support of his motion to dismiss, McGrath requests that the Court take judicial notice of a Minute Order from the Superior Court of the State of California for the County of Los Angeles, which states that Robertson is incarcerated for a life term without the possibility of parole. (Doc. #64, Ex. A.) Robertson objects to the minute order, arguing that McGrath provided no foundation to verify its accuracy, and that it has no relevance to the instant proceedings. However, the Court may take judicial notice of court records in other cases. *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). Further, the Court finds that the minute order is relevant to McGrath's statute of limitations argument as the statute of limitations for California inmates is determined by their term of incarceration.

Robertson also objects to McGrath's request on the ground that the request is an attempt to bias the Court with inadmissible character evidence. However, as McGrath introduced the minute order as evidence of Robertson's term of imprisonment, the Court finds that it is not an attempt to introduce inadmissible character evidence. Accordingly, the Court hereby GRANTS McGrath's request and takes judicial notice of the Superior Court minute order.

B. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure ("FRCP") 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). FRCP 8(a), which states that plaintiff's pleadings must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," provides the standard for judging whether such a cognizable claim exists. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). This standard is a liberal one that does not require plaintiff to set forth all the factual details of his claim; rather, all that the standard requires is that plaintiff give defendant fair notice of the claim and the grounds for

making that claim. *Leatherman v. Tarrant County Narcotics Intell & Coord Unit*, 507 U.S. 163, 168 (1993) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Under FRCP 12(b)(6), a motion to dismiss should be granted only if it appears beyond a reasonable doubt that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. For purposes of such a motion, all material allegations in the complaint must be taken as true and construed in the light most favorable to plaintiff. *In re Silicon Graphics, Inc. Sec Litig.*, 183 F.3d 970, 980 n.10. (9th Cir. 1999). The court may also consider documents attached to the complaint in connection with a FRCP 12(b)(6) motion to dismiss. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citing *Cooper v. Bell*, 628 F.2d 1208, 1210 n.2 (9th Cir. 1980)). If a plaintiff fails to attach to the complaint the documents on which it is based, defendant may also attach to a FRCP 12(b)(6) motion the documents referred to in the complaint. *Lee v. City of Los Angeles*, 250 F.3d at 688-89. In addition, whether requested or not, the court may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleadings. *In re Silicon Graphics*, 183 F.3d at 986.

If the court dismisses the complaint, it must then decide whether to grant leave to amend. The court "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, courts should consider factors such as "the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment." *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

C. Application to the Case at Bar

1. Whether Robertson failed to exhaust his administrative remedies

McGrath first argues that Robertson failed to exhaust his administrative remedies because his inmate appeal was limited to defendant Cusack's alleged misdeeds and did not allege, as he does in his amended complaint, that McGrath was deliberately indifferent and negligent by issuing

1 conflicting instructions.

2 In response, Robertson argues that he exhausted his administrative remedies by submitting a
3 timely Staff Complaint and appealing the review of that complaint through the final level of review.
4 Robertson further argues that McGrath himself participated in the administrative process in his
5 capacity as Warden, reviewing Robertson's appeal at the second-level stage of formal review.

6 The Prison Litigation Reform Act of 1995, codified at 42 U.S.C. § 1997e(a), mandates that
7 inmates exhaust their administrative remedies before bringing suit under 42 U.S.C. § 1983.
8 Exhaustion of administrative remedies is intended to serve two main purposes. *Woodford v. Ngo*,
9 126 S.Ct. 2378, 2385 (2006). First, exhaustion provides an agency with the "opportunity to correct
10 its own mistakes with respect to the programs it administers before it is haled into federal court." *Id.*
11 (citations omitted). Second, "exhaustion promotes efficiency" because "[c]laims generally can be
12 resolved much more quickly and economically in proceedings before an agency than in litigation in
13 federal court." *Id.* The burden is on the defendant to establish that the plaintiff did not exhaust his
14 administrative remedies. *Wyatt v. Terhune*, 315 F.3d 1108, 1117-20 (9th Cir. 2003).

15 The State of California provides its inmates with a four-level administrative appeals process
16 designed to aggrieve any departmental wrongs which adversely affect an inmate's welfare. Cal.
17 Code Regs. Tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this
18 system, a prisoner must proceed through several levels of appeal: (1) informal resolution, (2) formal
19 written appeal on a CDC 602 inmate appeal form, (3) second-level appeal to the institution head or
20 designee, and (4) third-level appeal to the Director of the California Department of Corrections. *Id.*
21 at § 3084.5. A decision at the Director's level of review constitutes exhaustion of an inmate's
22 administrative remedies for purposes of 42 U.S.C. § 1997e(a). *Id.* at § 3084.1(a).

23 Here, Robertson filed an inmate appeal on January 23, 2003, No. 03-00343, grieving the
24 January 12 incident. (Doc. #71, Ex. A.) In his appeal, Robertson describes the alleged incident and
25 states that Cusack failed "to follow institution policy, and procedure of institution lock down status
26 and memorandum of January 12, 2003 that was issued by the Warden, and A yard housing Facility
27 Captain." (*Id.* at 3.) In this inmate appeal, Robertson does not mention McGrath's alleged wrongful
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1 acts, focusing solely on Cusack's alleged failure "to follow institution policy." Thus, it would appear
2 that Robertson never filed an inmate appeal against McGrath for any alleged misconduct and he
3 failed to exhaust his administrative remedies for any such claims.

4 In his opposition, Robertson asserts that McGrath had "ample opportunity to address the
5 mistakes that gave rise to the subject incident before Robertson filed this action" because he
6 reviewed his appeal at the second level of review. (Doc. #70 6:7-8.) Robertson also argues that his
7 amended complaint makes clear that he is attacking the policy itself because he alleges that his
8 injuries were the result of a failure to follow a policy that would have protected him. (*Id.* at 5:6-10.)
9 The Court agrees that Robertson's amended complaint contains these allegations against McGrath,
10 yet its analysis must focus on whether his administrative appeal contained them, thereby permitting
11 the present action against McGrath. Robertson's January 12 appeal contains no allegations
12 concerning McGrath's misconduct - it simply alleges that Cusack failed to follow the prison's policy.
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14 However, on July 18, 2005, Cusack filed a motion for summary judgment (Doc. #34) in this
15 action, accompanied by a "Supplemental Declaration." (Doc. #35.) In this declaration, Cusack
16 stated his belief that conflicting instructions existed for the operation of the unit. (Doc. #35, ¶¶ 20,
17 23). It is unclear how a reasonable investigation by the public entity would not have included a
18 questioning of Cusack as to the reason for the subject incident. For purposes of this motion,
19 however, it is clear that the Court should provide Robertson the opportunity to prove facts in support
20 of his claim. If Robertson complained that Cusack failed to comply with prison policy, and Cusack
21 in turn stated that conflicting instructions existed, then Robertson's claim form sufficiently disclosed
22 facts to enable the Department of Corrections to investigate the merits of the claim. Accordingly,
23 Robertson did not fail to exhaust his administrative remedies.

24 2. Whether Robertson's claims against McGrath are barred by the statute of limitations

25 McGrath next argues that Robertson filed his amended complaint past the statute of
26 limitations. In response, Robertson argues that his amended complaint relates back to his original
27 complaint because they both arise from the same January 12, 2003 attack.
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1 The statute of limitations in § 1983 civil rights cases is governed by state law. *Wilson v.*
2 *Garcia*, 471 U.S. 261, 275 (1985). Because civil rights actions are best characterized as actions for
3 injuries to personal rights, federal courts borrow the statute of limitations that applies to personal
4 injury actions. *McDougal v. County of Imperial*, 942 F.2d 668, 672-74 (9th Cir. 1991). In
5 California, that statute of limitations is two years. Cal. Civ. Proc. Code § 335.1.

6 Here, Robertson filed his amended complaint over two years after the alleged incident.
7 However, where an inmate files an amended complaint, the relation-back doctrine must be
8 considered. *Merritt v. County of Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989). The relation-back
9 provisions of state law govern federal civil rights actions when the state law is more liberal, as is the
10 case in California. *Id.* Under California law, an amended complaint filed after the statute of
11 limitations has run is not barred if it "relates back" to a timely-filed original complaint. *Austin v.*
12 *Massachusetts Bonding & Ins. Co.*, 56 Cal.3d 596 (1961). Under FRCP 15(c)(2), an amended
13 complaint relates back to the original complaint when "the claim . . . asserted in the amended
14 pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in
15 the original pleading."

16 McGrath argues that the relation-back doctrine is inapplicable because he was never named
17 as a defendant in Robertson's original complaint. However, as discussed above, Robertson
18 complained that Cusack failed to comply with prison policy, and Cusack in turn stated that
19 conflicting instructions existed. Thus, Robertson's amended complaint against McGrath relates back
20 to his original complaint against because the additional claims arose out of the occurrence set forth
21 in the original pleading.

22 3. Whether Robertson failed to comply with the California Tort Claims Act

23 As to Robertson's negligence claim, McGrath argues that the Court lacks jurisdiction to
24 adjudicate this claim because Robertson failed to file a government claim form against him. In
25 response, Robertson argues that he filed a claim form that described the incident, described the
26 relevant policy that was violated, described Robertson's injuries, and described the dollar amount of
27 the claim. (Doc. #71, Ex. D.) Robertson further argues that any reasonable investigation by the
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1 public entity would have included a questioning of Cusack and would have resulted in discovery of
2 the asserted excuse for failing to comply with prison policy.

3 The California Tort Claims Act ("Act"), Cal. Gov't Code §§ 900 *et seq.*, requires plaintiffs to
4 file a claim with the Victim Compensation and Government Claims Board ("Board") before filing
5 suit against a public entity. Cal. Gov't Code § 945.4. "[T]he purpose of the claims statutes 'is to
6 provide the public entity sufficient information to enable it to adequately investigate claims and to
7 settle them, if appropriate, without the expense of litigation.'" *Phillips v. Desert Hospital District*,
8 49 Cal.3d 699, 705 (1989). Presentation of a claim to the Board is a mandatory prerequisite to
9 maintaining a cause of action against a public entity. *State v. Superior Court [Bodde]*, 32 Cal.4th
10 1234, 1245 (2004).

11 Here, Robertson's government claim focuses solely on Cusack. (Doc. #71, Ex. D.) His claim
12 to the Board never names McGrath, nor does the claim cite McGrath's allegedly inconsistent
13 instructions grieved in Robertson's amended complaint. Thus, it would appear that Robertson failed
14 to comply with the Act as to his claims against McGrath. Robertson, however, argues that his claim
15 form substantially complied with claims presentation requirements against McGrath because he
16 listed the names of the employees he knew, at that time, to be involved and any reasonable
17 investigation by the Board would have resulted in the discovery of his claims against McGrath.

18 Strict compliance with the Act is not necessary; rather, the requirements are satisfied by
19 "substantial compliance." *Johnson v. San Diego Unified School District*, 217 Cal.App.3d 692, 696
20 (1990). Where there has been an attempt to comply, the test of substantial compliance looks at
21 "whether sufficient information is disclosed on the face of the filed claims to reasonably enable the
22 public entity to make an adequate investigation of the merits of the claim and to settle it without the
23 expense of a lawsuit." *Id.* (internal citations omitted). Here, the Court finds that Robertson
24 substantially complied with the Act. Although Robertson did not list McGrath's name in his claim,
25 he provided sufficient information to reasonably enable the Department of Corrections to investigate
26 his claim and determine its cause. The fact that Cusack stated that conflicting instructions existed
27 only furthers this finding. Accordingly, Robertson complied with the California Tort Claims Act.

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2 **IV. CONCLUSION**

3 Based on the foregoing analysis, the Court hereby DENIES McGrath's Motion to Dismiss.
4 The Court shall conduct a Case Management Conference on September 14, 2006. The parties shall
5 file their joint case management conference statement by September 7, 2006.

6 **IT IS SO ORDERED.**

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8 Dated: August 14, 2006



9 MARIA-ELENA JAMES
United States Magistrate Judge